

¹See K.S.A. 44-512a.

period from November 1997 through the date of the demand; payment for an orthopedic mattress prescribed by claimant's treating physician; payment for the installation of an elevator at claimant's residence to accommodate her work-related injuries; and payment for the installation of a handicapped-accessible shower. Respondent refused to pay these itemized expenses. Thereafter, on August 25, 1999, claimant filed a Motion for Penalties requesting assessment of penalties against the respondent for not paying the expenses when due.

The Administrative Law Judge held hearings on claimant's Motion for Penalties on October 14, 1999, and on December 14, 1999. At the December 14, 1999, hearing, claimant's demand was for payment of these expenses for the period from November 1997 through December 1, 1999, in the total amount of \$12,601.16. The Administrative Law Judge denied claimant's request for penalties in the January 26, 2000, Order on Penalties, which is the subject of this appeal.

On appeal, claimant contends penalties should be assessed against the respondent. First, because the prescription and water therapy expenses are the same identified expenses, except for the time period requested, that were ordered paid by the Administrative Law Judge's March 11, 1998, Award and the Appeals Board's January 26, 1999, Order. Second, penalties also are due from respondent for refusing to reimburse claimant for expenses she was required to pay for an orthopedic mattress, the installation of an elevator, and a handicapped-accessible shower in her home. Claimant contends those expenses had to be made on an emergency basis because she had to move out of her mother's home, which was handicapped accessible, back to her home because her mother passed away unexpectedly. Furthermore, claimant asserts those expenses are medically necessary as prescribed by claimant's treating physician.

Additionally, the claimant requests an attorney fee award for services performed by her attorney in representing the claimant in the penalty proceeding before the Administrative Law Judge and the Appeals Board.²

Conversely, the respondent requests the Appeals Board to affirm the Administrative Law Judge's order that denied claimant's request for penalties. The respondent argues penalties can only be assessed against the respondent for nonpayment of medical compensation that has been awarded under the Workers Compensation Act.³ In this case, respondent asserts that all of the medical expenses, claimant has alleged as due and unpaid, are medical expenses not awarded by either the Administrative Law Judge or the

²See K.S.A. 1999 Supp. 44-536(g).

³See K.S.A. 44-512a(a).

Appeals Board. Respondent, therefore, argues it has no obligation to pay those medical expenses upon demand and no penalties are due.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments contained in the parties' briefs, the Appeals Board concludes the Administrative Law Judge's order denying claimant's request for penalties should be affirmed.

The original Award was entered by the Administrative Law Judge in this matter on March 11, 1998. At the regular hearing, claimant admitted into evidence exhibits that itemized certain expenses for medical treatment, prescriptions, water therapy, and medical mileage that were either unpaid or were paid by claimant and reimbursement was requested. In the Award, the Administrative Law Judge ordered the expenses paid, except for the medical mileage for trips for treatment from an unauthorized physician, Alexander G. Mallouk, M.D.

The Administrative Law Judge's Award also contained an order that future medical treatment for claimant's work-related injuries may be awarded upon proper application and hearing upon notice to all parties.

The Administrative Law Judge's Award was appealed to the Appeals Board. In an Order dated January 26, 1999, the Appeals Board affirmed the Administrative Law Judge's order in regard to the unpaid or request for reimbursement of medical expenses and medical mileage. The Appeals Board also ordered that future medical treatment may be awarded upon proper application to and approval by the Director of Workers Compensation.

Claimant did not make a demand for payment of the subject medical expenses until June 25, 1999. The Motion for Penalties for nonpayment of those medical expenses was not filed until August 25, 1999. The prescription expenses and water therapy expenses date back to November 1997. The purchase of the orthopedic mattress and the handicapped-accessible modifications to claimant's home were all completed in the months of June and July 1998.

An injured employee shall be entitled to a civil penalty against the employer or its insurance carrier if any compensation, including medical compensation, which has been awarded under the Workers Compensation Act, is not paid when due.⁴ Claimant contends the Appeals Board's January 26, 1999, Order provided for payment of prescription expenses and water therapy expenses identical to the expenses claimant is now seeking reimbursement. Accordingly, claimant contends those expenses were authorized medical

⁴See K.S.A. 44-512a(a).

expenses pursuant to the Appeals Board's Order. Additionally, claimant asserts the expenses for the orthopedic mattress and handicapped-accessible modifications required of claimant's home are expenses made on an emergency basis. Claimant had to move out of her mother's home that was handicapped accessible and back into her home that was not handicapped accessible. Also, claimant argues she should not be required to seek approval of these expenses because evidence was presented through reports from her treating physician that the requested expenses are reasonable and necessary and are related to her work-related injuries.

Conversely, respondent argues the penalty statute is clear that a penalty is only assessable against the employer or its insurance carrier when compensation, including medical compensation, has been awarded and is not paid when due.⁵ Medical expenses submitted by the claimant that were incurred between November 1997 and December 1999 were never ordered paid by either the Administrative Law Judge or the Appeals Board. The Appeals Board's January 26, 1999, Order only ordered the medical expenses paid through October 1997 as itemized and admitted into evidence at the regular hearing. The Order then provided for future medical expenses to be paid only upon application and approval of the director.

One of the complications of this case is the fact that claimant suffers from multiple health conditions in addition to her work-related injuries. Claimant suffered work-related injuries to both knees, lumbar spine, and a ventral incisional hernia. Claimant is requesting for payment of prescription expenses that also relate to her diabetes and high blood pressure conditions. Claimant alleges that those conditions were either caused or aggravated by her work-related injuries.

In March 1996, claimant, on her own, started seeing Dr. Mallouk, a physician authorized under the respondent's private health care insurance. At the time of the motion hearings, claimant remained under Dr. Mallouk's care and treatment for all of her health problems both work-related and nonwork-related.

The Appeals Board concludes that claimant's request for penalties to be assessed against respondent for reimbursement or payment of prescriptions, water therapy, orthopedic mattress, and handicapped-accessible modifications to claimant's home should be denied. The Appeals Board finds that none of the requested expenses have been awarded under the Workers Compensation Act as required by the penalty statute. Therefore, the Appeals Board finds the respondent and its insurance carrier, at this time, have no responsibility for those expenses. But the Appeals Board also concludes this Order does not foreclose claimant from making application for approval of these medical expenses as reasonable and necessary medical expenses related to claimant's compensable injuries.

⁵See K.S.A. 44-512a(a).

The Administrative Law Judge did not address claimant's request for attorney fees under K.S.A. 1999 Supp. 44-536(g). Accordingly, the Appeals Board cannot, without the stipulation of the parties, review this issue until the Administrative Law Judge has considered the request and either granted or denied the request.⁶ Therefore, claimant's request for attorney fees is remanded to the Administrative Law Judge for determination of claimant's request for attorney fees.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Robert H. Foerschler's January 26, 2000, Order on Penalties, that denied an award of penalties against the respondent and in favor of the claimant, should be, and the same is hereby, affirmed.

Claimant's request for attorney fees is remanded to the Administrative Law Judge for determination.

IT IS SO ORDERED.

Dated this ____ day of June 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Terri Z. Austenfeld, Overland Park, KS
Denise E. Tomasic, Kansas City, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director

⁶See K.S.A. 1999 Supp. 44-555c(a).